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August 22, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *PP Docket No. 93-253, Implementation of Section 309(j) of the Communications Act - Competitive Bidding*

On behalf of Pacific Bell Mobile Services, please find enclosed an original and six copies of its "*Petition For Reconsideration and Clarification*" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,



Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 2 2 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

PP Docket No. 93-253

**PETITION FOR RECONSIDERATION AND CLARIFICATION OF
PACIFIC BELL MOBILE SERVICES**

Pursuant to Section 1.429 of the Commission's Rules,
Pacific Bell Mobile Services hereby petitions the Commission to
reconsider and clarify selected portions of its Fifth Report and
Order in the above-captioned proceeding.

- I. THE COMMISSION SHOULD AUCTION THE BTA LICENSES THAT
CORRESPOND TO THE SAME TERRITORY FOR WHICH PIONEER
PREFERENCES WERE AWARDED SIMULTANEOUSLY WITH THE REMAINING
MTA.

The Commission has recognized that grouping
interdependent licenses together provides bidders with valuable
information about the prices of complementary and substitutable
licenses while such licenses are still up for bid. This

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facilitates awarding the licenses to bidders who value them most highly.¹ However, the Commission concluded that in the case of the broadband auctions, the cost and complexity of auctioning a very large number of interdependent licenses simultaneously outweighed the advantages of bidding flexibility and valuation information.² Consequently, the Commission decided not to auction all the broadband licenses simultaneously. Instead, the Commission has divided the broadband licenses into three groups.³ There will be a separate simultaneous auction for each group. The first group consists of the 99 MTA licenses in blocks A and B. The second group consists of the 986 BTA licenses in blocks C and F which have been set aside for designated entities. The last group consists of the 986 BTA licenses in blocks D and E.⁴

The decision to split the auction of broadband licenses has a significant effect on those license areas in which pioneer preferences have been awarded. In those license

¹ In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, released July 15, 1994, para. 36. ("Fifth Report and Order").

² Id.

³ Id.

⁴ Id. at para. 37.

areas, only one MTA will be auctioned in the first auction. Corresponding BTAs will be auctioned in the third auction. This means that bidders for the one MTA will need to make bidding decisions about the single MTA license without learning anything about bids for any other substitutable license.

Attached is the statement of Professor Paul Milgrom. As Professor Milgrom explains, the efficient assignment of licenses requires bidders be allowed to compare the values of substitutable licenses. However, this comparison is inhibited by the split in the auction. Thus, from an economic perspective, it is much more likely that the final allocation of licenses will be inefficient.

For this reason, we propose a modification of the Commission's rules. The Commission should expand the first auction to include the licenses for the D and E band BTA licenses for those areas in which the A-band license has been set aside for a pioneer preference award.⁵ This will help to ensure a more economically efficient assignment of licenses.

⁵ If the Commission believes our proposal would either be cumbersome or would delay the auction, then we suggest, as an alternative, that the Commission combine all BTA licenses in a single auction. In no case should the auction be delayed.

II. THE COMMISSION SHOULD CLARIFY THAT THE SHORT-FORM APPLICATIONS WILL BE ACCEPTED FOR FILING PRIOR TO EACH INDIVIDUAL BROADBAND AUCTION.

The Commission's rules require that to be eligible to bid in an auction an applicant must submit a short-form application on the date specified by Public Notice.⁶ The short-form application must include the identity of each license on which the applicant wishes to bid. It must also include an exhibit that identifies all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

The Commission's Order does not address the issue of when the short-form applications will be filed for the three broadband auctions. This would not be a significant issue if there were a single auction for all the broadband licenses. However, because the rules now provide for three separate auctions, the timing of the applications will affect how bidders approach back-up strategies. Therefore, we urge the Commission

⁶ 47 CFR §1.2105.

to clarify that there will be separate submission dates for the short-form applications for each auction.

If all the short-form applications were due on a single date prior to the first auction, the flexibility of bidders would be severely diminished. Bidders would have to make decisions about all their bidding strategies including back-up strategies for all the auctions, without the benefit of information on the outcome of the auctions. They would have to identify the licenses on which they intended to bid in all three auctions even though the outcome of the first auction would most likely affect strategies for subsequent auctions.

The Commission indicated that one of the reasons it choose to auction blocks C and F in the second auction was that it expected that "non-designated entities who are unsuccessful in acquiring MTA licenses in blocks A and B will want to become partners with or make investments in designated entities so as to gain an interest in the 30 MHz licenses in block C."⁷ This is less likely to happen if applicants must make all decisions on partners and bidding strategies prior to all the MTA auctions.

⁷ Fifth Report and Order, para. 39.

The Commission recently relaxed the anti-collusion rules to permit bidders who have not listed the same licenses on short-form applications to engage in discussions and enter bidding consortia or joint bidding arrangements during the course of the auction.⁸ However, if all of the short-form applications for broadband licenses must be filed on the same day, flexibility during all the auctions is still limited for those parties that identified interest on the same license. After completion of the MTA auction an unsuccessful bidder desiring to partner with a designated entity would have its potential partners limited to those who did not identify the same license on their short-form applications. The Commission should clarify that there will be a separate filing date for short-form applications for each auction. This will allow parties more flexibility in implementing alternate bidding strategies, including partnerships with designated entities.

⁸ In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Memorandum Opinion and Order, released August 15, 1993, para. 51.

III. THE COMMISSION SHOULD CLARIFY THAT A PASSIVE INVESTOR CAN HOLD UP TO 25 PERCENT OF THE APPLICANT'S TOTAL EQUITY.

The language in the body of the Fifth Report and Order and in the attached rule relating to passive equity contain a discrepancy. At three places in the body of the Order the language indicates passive equity of an investor holding under 25% of the total equity will not be attributed.⁹ However, the rule itself states that "The gross revenues, total assets and personal net worth of a person that holds an interest in an applicant (or licensee) shall not be considered for the purposes of determining financial eligibility as long as (A) such person holds no more than 25 percent of the applicant's (or licensee's) passive equity...."¹⁰

Thus, under the language in the body of the Order the passive investor is limited to 24.9% of the equity, but the rule

⁹ The language of the Order states in para. 115 that "Where the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity..." In para. 158 the Order states "the gross revenues, total assets, personal net worth and affiliations of any investor in the applicant are not considered as long as the investor holds less than 25% of the applicant's passive equity." In para. 152, the Order states "Specifically, the gross revenues, total assets and net worth of all investors holding 25 percent or more of the company's passive equity... will be attributed...."

¹⁰ 47 CFR §24.709(b)(4)(i).

itself puts the limit at 25%. We urge the Commission to clarify that the number in the rule is the correct number.

IV. LONG-FORM APPLICATIONS SHOULD BE PLACED ON PUBLIC NOTICE IN A TIMELY MANNER AFTER EACH AUCTION.

The Commission's rules indicate that 10 days after an applicant is notified that he or she is the highest bidder, the long-form applications must be submitted.¹¹ After receiving the long-form applications the rules provide that the Commission will put on them public notice.¹²

Since there will be three separate broadband auctions, we urge the Commission to issue separate public notices after each auction so applications can be processed expeditiously. One of the Commission's goals for its regulation for PCS was the speed of deployment.¹³ A separate public notice after each auction will support that goal, by allowing the licensing process to move forward in a timely manner.

¹¹ 47 CFR §1.2107.

¹² 47 CFR §1.2108.

¹³ In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Service, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, para. 5. (1993).

V. THE COMMISSION NEEDS TO PROVIDE GUIDANCE ON ACCEPTABLE MANAGEMENT CONTRACTS AS SOON AS POSSIBLE.

One factor in the development of a bidding strategy is the type of management assistance a potential licensee can expect to secure. In the complex world of telecommunications, management contracts are a necessity. Only the most experienced and sophisticated licensees can operate their licenses without any assistance from third parties. The Commission acknowledges their importance by specifically noting, "So long as the applicant remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants."¹⁴

We believe that many designated entities will desire the experience and knowledge of established telecommunications providers. However, their ability to obtain that expertise is threatened by the current uncertainty regarding the boundaries of acceptable management contracts.

In its Order the Commission cites Intermountain Microwave for the criteria for determining whether an entity remains in de facto control of a license, i.e., the boundaries

¹⁴ Fifth Report and Order, para. 158, n. 135.

for an acceptable management contract.¹⁵ The Intermountain Microwave criteria are as follows:

- (1) Does the licensee have unfettered use of all facilities and equipment?
- (2) Who controls daily operations?
- (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (4) Who is in charge of employment, supervision, and dismissal of personnel?
- (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating? and
- (6) Who receives monies and profits from the operation of the facilities?¹⁶

However, the Commission's application of the Intermountain Microwave criteria is unclear because of the remand by the United States Court of Appeals for the District of Columbia Circuit of Telephone and Data Systems v. the FCC.¹⁷ There, the Commission had approved a management contract in which the management entity managed day-to-day operations, subject to the licensee's ultimate supervision and control,

¹⁵ Id at para. 164, n. 143.

¹⁶ Intermountain Microwave, 24 Rad. Reg. 983, 984 (1983).

¹⁷ Telephone Data Systems, Inc. v. FCC, 19 F. 3d 42, (D.C. Cir. 1994).

which consisted of approval of annual budget and major expenditures, receipt of periodic reports on the status of operations and maintenance of regular contact with the management team. The Court however commented that the control of daily operations, "must mean more than approval of major expense and a loosely defined practice of maintaining 'contact'." ¹⁸

The Court concluded:

The Commission's application of the Intermountain test in this case amounts to determination that it is a meaningless recitation with which the Commission may find compliance or noncompliance by arbitrarily saying in one case that theoretical access to the facility is sufficient while in another that the purported licensee must have actual control of the facility; that in one case a theoretical, hazy, and intermittent right to participate in daily operations is sufficient, in another actual control is required; that in one case awareness of policy decisions is sufficient and in another determining and carrying out policy decisions including preparing and filing applications is required; and that in one case being in actual charge of employment supervision and dismissal of personnel is a determinative factor and in another a factor hardly relevant to the Intermountain analysis at all. This is not reasoned decisionmaking, but the

¹⁸ Id. at p. 49.

very sort of arbitrariness and capriciousness we are empowered to correct. Correct it we shall in this case. We therefore remand the Atlantic City order so that the Commission may bring its decision into compliance with agency precedent or explain its departure.¹⁹

The Commission needs to resolve the uncertainty and ambiguity of its criteria quickly. Parties will not enter into agreements until this cloud is removed because of a significant threat of litigation. That threat will exist until the Commission provides guidance as to its application of the Intermountain Microwave criteria. The industry as a whole, but particularly designated entities, will benefit from this guidance.

VI. CONCLUSION

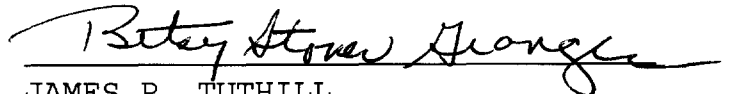
For the foregoing reasons, we seek clarification on the limit of passive equity an investor can have without attribution, on the timing of filing short-form applications, and the timing of public notices of long-form applications. We encourage the Commission to provide guidance on its future

¹⁹ Id. at p. 50.

application of the Intermountain Microwave criteria as soon as possible. Finally, we urge the Commission to auction BTA licenses that correspond to the same territory for which an MTA pioneer preference was awarded simultaneously with the remaining MTA.

Respectfully submitted,

PACIFIC BELL MOBLIE SERVICES

A handwritten signature in cursive script, reading "Betsy Stover Granger".

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Date: August 22, 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Statement of Paul R. Milgrom

1. My name is Paul R. Milgrom. I am the Shirley and Leonard Ely, Jr. Professor of Humanities and Sciences and Professor of Economics of Stanford University in Stanford, California, 94305. My background and experience are set forth in my November 8, 1993 affidavit which was attached to the comments of Pacific Bell and Nevada Bell filed November 10, 1993 in the P.P. Docket No. 93-253 in the Matter of Implementation of Section 309(j) of the Communications Act (competitive Bidding).

2. I have been asked by Pacific Bell and Nevada Bell to comment on how the Commission's plan to separate the auction sales of the MTA and BTA licenses interacts with the pioneer preference awards.

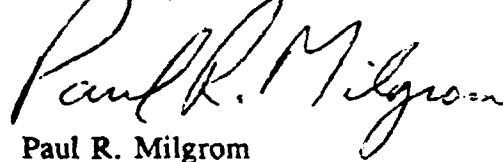
3. The pioneer preference awards have complicated the planning of companies wishing to provide wide-area services that both cover multiple MTAs, and include areas in which pioneer preferences awards have been made. For such companies to provide their planned services, one important alternative is to acquire MTA licenses where those are available and licenses in the D and E bands where the one MTA band license is unavailable due to a pioneer preference award. An efficient assignment of licenses requires comparing the value of that alternative against other plans by the same bidder or other bidders. An auction in which all the relevant licenses were available would entail just such a comparison.

4. The separation of the auctions for the BTA and MTA licenses, however, would inhibit this comparison. Companies would be forced to make bidding decisions about the MTA licenses before learning anything about other's bids for the relevant BTA licenses. From an economic perspective, this would make it much more likely that the final

allocation of licenses will be inefficient, contrary to the policy goals endorsed in the Commission's Second Report and Order in PP Docket No. 93-253.

5. This significant inefficiency could be eliminated by modifying the auction plan. In those areas where the A-band license has been set aside as a pioneer preference award, the Commission could enhance efficiency by expanding the MTA auction to include the licenses for the D and E band BTA licenses. That would allow companies to evaluate their most closely substitutable options in a single auction and, through the auction process, would compare the value of the mixed license type strategy with that of other strategies. The result would likely be a more rational and economically efficient assignment of licenses.

Respectfully submitted,

A handwritten signature in black ink, reading "Paul R. Milgrom". The signature is written in a cursive, flowing style with a large initial "P".

Paul R. Milgrom